No. 87-1597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALABAMA POWER COMPANY,
Appellant,

vs.

KAY CAPPS, Administratrix of the Estate of
Richard D. Capps, Deceased,
Appellee.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE TO AFFIRM JUDGMENT

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SUP. CT. R. 16(1)(b) & (c) 1

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MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE TO AFFIRM JUDGMENT

Appellee, pursuant to Rules 16(1)(b) & (c) of the Rules of the Supreme Court of the United States, moves that the Appeal herein taken be dismissed on the grounds (1) it does not present a federal question which was raised in a timely manner, (2) there are adequate non-federal grounds for the decision, and (3) it does not present a substantial federal question, or, in the alternative, moves that the judgment of the Supreme Court of Alabama be affirmed because it is manifest that the questions on which the decision of the case depends are so unsubstantial as not to need further argument.

STATEMENT

On July 19, 1984, Richard D. Capps was electrocuted when the raised bed of his dump truck came in contact with an electric distribution line maintained by the Appellant, Alabama Power Company, hereinafter referred to as "APCo." The Appellee Kay Capps, the deceased's widow, brought an action on behalf of herself and her four minor children against APCo under the Alabama wrongful death statute.[1] On September 2, 1986, a jury found against APCo and awarded Mr. Capps' estate the sum of $500,000.00. In post-trial motions for a new trial and for judgment notwithstanding the verdict, APCo for the first time presented to the trial court an attack on the constitutionality of the state's wrongful death statute. The trial judge denied both motions, and APCo appealed to the Supreme Court of Alabama. In affirming the trial judge's rulings, that court held the verdict was amply supported by the evidence, the award was not excessive, and APCo had not timely raised the issue of the constitutionality of the wrongful death statute. *Alabama Power Company v. Capps*, 519 So. 2d 1328 (Ala. 1988).

In its opinion, the Supreme Court of Alabama quoted with approval the following findings of the trial judge:

> There was an abundance of evidence presented in this case from which the jury could find that the Alabama Power Company knew or should have known that their uninsulated power line created a dangerous condition and that persons, while working in the area where the accident occurred, might come in contact therewith. This evidence included testimony that the line in question was low; that its vertical clearance violated recognized safety standards; that large mining equipment and trucks had operated in close proximity to the line for several years; that defendant's meter readers had gone within a few feet of the line

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[1] ALA. CODE Sections 6-5-410 & -411 (1977).

> on a monthly basis for several years prior to the accident; that the Alabama Power Company failed to follow its own inspection standards concerning pole inspection on the line involved in this suit; and, that shortly before [Mr. Capp's] death a piece of large mining equipment, used in the area, severed the electrical line, completely pulling it to the ground within close proximity to the accident site causing Alabama Power Company to go to the area to repair the same.
>
> There was evidence that the defendant, Alabama Power Company, was on notice of a dangerous condition and, in violation of their own and the industry's accepted safety rules, took no action to inspect or correct the problem and the resulting low hanging uninsulated wire caused the death of Richard Capps.

Id. at 1329.

Wrongful death actions under Alabama law are unique from other American jurisdictions in that only "punitive," i.e., non-compensatory, damages are recoverable. In 1927 this Court held that this feature of the Alabama wrongful death statute did not unconstitutionally deprive a defendant/employer, found to be merely negligent in causing the death of an employee, of property without due process of law. *Louis Pizitz Dry Goods Company v. Yeldell*, 274 U.S. 112 (1927). In that opinion, Mr. Justice Stone observed that:

> The legislation now challenged has been on the statute books of Alabama in essentially its present form since 1872. The liability imposed is for tortious acts resulting in death, but the damages, which may be punitive even though the act complained of involved no element of recklessness, malice or wilfulness, may be assessed against the employer who, as here, is pesonally without fault. The Supreme Court of Alabama has repeatedly ruled that the statute is aimed at the prevention of death by wrongful act

> or omission. Savannah & M. R. Co. v. Shearer, 58 Ala. 672, 680 [(1877)]; South & North Ala. R. Co. v. Sullivan, 59 Ala. 272, 279 [(1877)]. "The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides,' and the action given is purely cicil in its nature for the redress of private, and not public wrongs." Southern R. Co. v. Bush, 122 Ala. 470, 489, 26 So. 168 [(1898)]. In defining the scope of the act, the state court has pointed out that the extent of the culpability and the amount of the verdict are for the jury and that its finding is not to be disturbed unless the verdict is "induced or reached on account of prejudice, passion, or other improper motive or cause." Mobile Electric Co. v. Fritz, 200 Ala. 692, 693, 77 So. 235 [(1917)]

Id. at 114-15. The Supreme Court of Alabama has again and again failed "to find any constitutional infirmity in the [wrongful] death statute as written by the legislature and construed by this Court." *Merrell v. Albama Power Company,* 382 So. 2d 494, 497 (Ala. 1980). *See also Alabama Power Company v. Cantrell*, 507 So. 2d 1295 (Ala. 1986); *Black Belt Wood Company, Inc. v. Sessions*, 514 So. 2d 1249, 1260-63 (Ala. 1986).

In *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the Supreme Court of Alabama established the procedure by which trial judges are to review verdicts to determine if they are excessive or the product of bias, passion, corruption, or other improper motive. The trial judge utilized the *Hammond* procedure in determining the recovery by the Capps estate was not excessive.

ARGUMENT

I. The Questions Which The Appellant Seeks To Have Reviewed Were Not Properly Raised And Preserved Below.

APCo freely concedes it did not present the federal constitutional questions prior to the submission of post-trial motions for new trial and judgment notwithstanding the verdict. The constitutional challenges were repeated in the briefs filed with the Supreme Court of Alabama. That court refused to address the attacks on the constitutionality of the wrongful death statute because they were not timely raised. *Alabama Power Company v. Capps,* 519 So. 2d 1328, 1329 (Ala. 1988). In clear dicta, the state supreme court stated the allowance of only punitive damages in wrongful death actions "was based on sound reasoning" and that the Court had previously declined to overrule its interpretation of the appropriate statutory provisions. *Id.*

Citing *Illinois v. Gates*, 462 U.S. 213, 218-220, *rehearing denied*, 463 U.S. 1237 (1983), and *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), APCo concludes that "the federal constitutional questions now presented to this Court were pressed below and passed upon by the Supreme Court of Alabama in satisfaction of this Court's prudential 'pressed and passed upon' rule." In the *Gates*' opinion, Mr. Justice Rehniquist opined that "the Court developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in the state court." *Illinois v. Gates*, 462 U.S. at 219 n.1 (emphasis in original). Neither of these two jurisdictional prerequisites were met in this case.

This Court has held, absent evidence in the record that an issue was raised in an Alabama trial court, there is no jurisdiction to consider the issue in subsequent appeals. *Exxon Corporation v. Eagerton*, 462 U.S. 176, 181-82 n.3 (1983). *See also Orr v. Orr*, 440 U.S. 268, 275 (1979). The Supreme Court of

Alabama has continually ruled that it "will not consider an issue as to the constitutionality of a statute where such issue is raised for the first time in a motion for new trial." *Crews v. Houston County Department of Pensions and Security*, 358 So. 2d 451, 455 (Ala. Civ. App.), *cert. denied*, 358 So. 2d 456 (Ala. 1978)(citing *Dale v. Dale*, 54 Ala. App. 505, 310 So. 2d 225 (1975)). *See also Burton v. Burton*, 379 So. 2d 617, 618 (Ala. Civ. App. 1980); *Hicks v. Huggins*, 405 So. 2d 1324, 1327 (Ala. Civ. App.), *writ denied*, 405 So. 2d 1328 (Ala. 1981). APCo offers no explanation as to why it should be excused from having to comply with the established practice in Alabama.[2] Because the issue of constitutionality was presented in an untimely fashion, the federal questions were not "raised" in the state court.

Having failed to raise the federal questions in the state court, APCo contends the Supreme Court of Alabama "reached and decided" the merits of its attack on the constitutionality of Alabama's wrongful death statute. The fallacy of this contention is demonstrated by this Court's reading of the holding in *Morrison v. Watson*, 154 U.S. 111, 115 (1984):

> It declined to hear the case because the question presented here had not been pressed or passed on below. The Court acknowledged that the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court . . . . Nonetheless, it held that there was no showing that "there was any real contest at any stage of this case upon the point," . . ., and that without such a contest, the routine restatement and application of settled law by an appellate court did not satisfy the "not pressed or passed upon below" rule.

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[2] Because of Mr. Capp's age (35), income ($22,000.00 in 1983), and family (a wife and four minor children), it is likely that APCo initially assumed a potential award of punitive damages would be substantially less than recovery based upon notions of compensatory damages.

Illinois v. Gates, 462 U.S. 213, 223-24, *rehearing denied*, 463 U.S. 1237 (1983). Justice Almon of the Supreme Court of Alabama merely made a "routine restatement of settled law" and expressed a belief that the court would not have held in APCo's favor had the questions been timely raised at the trial. This is not a situation where the state appellate court overlooked the tardy raising of a constitutional challenge and decided instead to reach the federal question. Had it been this Court would have jurisdiction. *Orr v. Orr*, 440 U.S. 268, 276 n.4 (1979).

APCo endeavors to invoke jurisdiction to hear its appeal under 28 U.S.C. Sec. 1257(2). It has the burden of establishing that all the requirements of that section are met. APCo has failed to satisfy either prerequisite for bestowing jurisdiction upon this Court; the appeal is due to be dismissed.

II. The Judgment Below Rests On An Adequate Non-Federal Basis.

As a parallel consideration to the preceding argument, this Court has held it will decline jurisdiction if the state court's decision is based on an adequate non-federal basis. *See International Longshoremen Association, AFL-CIO v. Davis*, 380 U.S. 380, ____, 106 S.Ct. 1904, 1910 (1986)(citations omitted). While this Court in that case recognized the Alabama procedural rule requiring parties in a litigation to raise certain issues prior to the trial, the majority felt the applicable federal statute precluded the waiver of a defense of pre-emption. *Id.* Four Justices noted that the majority's position "poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result." *Id.* at 1917 (Rehnquist, J. concurring). Mr. Justice Rehnquist opined further:

> Here Alabama, by application of a neutral statute with a precise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of

> jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance.

Id. at 1918.

As previously noted, the Supreme Court of Alabama has repeatedly rejected a party's attempt to gamble in this fashion. In the present case, there is no federal statute which precludes the exercise of a known procedural practice. The state procedural rule is thus adequate non-federal basis for declining jurisdiction in this case.

III. The Decision Of The Supreme Court Of Alabama Is Clearly Correct And No Substantial Federal Questions Are Presented In This Appeal.

APCo suggests to this Court that the Alabama wrongful death statute deprives it of its property without due process, denies it equal protection of the laws, and imposes excessive fines in violation of the Fourteenth and Eighth Amendments of the Constitution of the United States. In its "Jurisdictional Statement" APCo endeavors to utilize this Court's decision to docket an appeal in *Bankers Life & Casualty Co. v. Crenshaw*, ____ U.S. ____, 107 S.Ct. 1367 (1987); passages from *Smith v. Wade*, 461 U.S. 30 (1983); and views expressed in two law review articles.

Ms. Capps believes this Court's decision in *Louis Pizitz Dry Goods Company v. Yeldell*, 274 U.S. 112 (1927), resolved any questions as to whether APCo's due process protections have been deprived. In that opinion, the Court was confronted with the situation of a defendant whose conduct was merely negligent. While APCo claims it was guilty of only simple

negligence, the state trial judge and appellate court indicated APCo's conduct in relation to the electric transmission line amounted to more than "simple" negligence. For the purposes of ruling on this motion, the characterization of APCo's conduct is not material under the holding in *Pizitz Dry Goods* and subsequent opinions of the Supreme Court of Alabama.

Ms. Capps' counsel has been informed by the attorneys representing the appellee in *Bankers Life and Casualty Company v. Crenshaw*, ____ U.S. ____, 107 S.Ct. 1367 (1987), that one of the primary issues was the constitutionality of Mississippi's "affirmance on appeal" statute. In *Allstate Insurance Co. v. Hawkins*, ____ U.S. ____, 108 S.Ct. 212, *rehearing denied*, ____ U.S. ____, 108 S.Ct. 477 (1987), this Court denied a petition for writ of certiorari to the Supreme Court of Arizona in a case where Allstate had raised constitutional federal questions in connection with the imposition of punitive damages in a bad faith case.

There is a key distinction between the punitive damages awarded in an Alabama wrongful death action and the so-called "windfall" recoveries which concern commentators, such as Malcohm Wheeler, and which were discussed in the *Smith v. Wade* opinion. Mr. Justice Stone recognized this in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). The plaintiff in an Alabama wrongful death action may recover only one kind of damages; there is not an award of compensatory damages and then a "bonus" award. The criticisms of the practice of awarding punitive damages discussed by APCo have no relevance when the plaintiff is only entitled to one form of damages, regardless of the term used to describe the form.

APCo's discussion of the recently enacted legislation[3] is inappropriate but belies the Appellant's argument. The Alabama Legislature provided that "[t]his article shall not affect the

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[3] ALA. CODE Sections 6-11-20 to -30 (1987 Cum. Supp.).

rights of any person if such rights accrued prior to June 11, 1987."[4] Since the verdict in the present case was rendered on September 2, 1986, the provision of the new statutes are inapplicable.[5] Moreover, the question of the constitutionality of these statutes was never presented to the state courts. The Legislature explicitly excluded wrongful death actions from coverage under the new law pertaining to punitive damages.[6] Such exclusion bolsters the fact that the "punitive" damages recoverable in a wrongful death action are not the same as the "punitive" damages which *may* be awarded in other civil actions. As the Supreme Court of Alabama has found no reason for disturbing the wrongful death action practice, neither did the Legislature.

Contrary to APCo's assertion, an Alabama jury is not permitted to assess the amount of damages in a wrongful death action totally at its discretion. Under the procedure adopted in *Hammond v. City of Gadsen*, 493 So. 2d 1374 (Ala. 1986), a trial judge has an affirmative duty to review all verdicts if the defendant raises the issue of excessiveness in a post-trial motion. This protection against "run-a-way" verdicts was utilized in this case.

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[4] ALA. CODE Section 6-11-30 (1987 Cum. Supp.).

[5] Furthermore, since this legislation was enacted after the conclusion of the trial, it is inconceivable that this Court has jurisdiction to address APCo's Second "Question Presented."

[6] ALA. CODE Section 6-11-29 (1987 Cum. Supp.).

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Supreme Court of Alabama be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the within and foregoing Motion to Dismiss Appeal or, in The Alternative to Affirm Judgment has been served upon all counsel of record by depositing same in the United States mail, first-class postage prepaid and properly addressed as follows:

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This 20th day of April, 1988

/s/ John A. Taber